No. 97-634

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

vs.

RONALD R. YESKEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

KENT S. SCHEIDEGGER*
CHRISTINE M. MURPHY
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Attorney of Record

QUESTION PRESENTED

Does the Americans with Disabilities Act apply to inmates in state prisons?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rule of Court

United States Constitution

United States Statutes

State Statutes

Treatises

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

vs.

RONALD R. YESKEY,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

In the 1960s and early 1970s, lax punishment policies were followed by a sharp increase in crime rates. In the 1980s and 1990s, larger sentences were followed by a sharp drop in crime.

---

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

This greater protection of law-abiding people from violent criminals comes at a cost, however. As the prison population rises, the cost brings calls to repeat the mistakes the of the past and once again let criminals off with short sentences. This problem is aggravated by requirements that unnecessarily drive up the cost of running prisons.

Application of the Americans with Disabilities Act to state prisons would drive up the cost with its vague requirements and extensive litigation. By increasing the financial pressure to turn criminals loose, it would be contrary to the interests of law-abiding people and victims of crime which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Ronald Yeskey, a Pennsylvania prison inmate, was denied admission to a motivational boot camp program run by the state's Department of Corrections. *Yeskey* v. *Pennsylvania Dept. of Corrections*, 118 F. 3d 168, 169 (CA3 1997). The boot camp requires rigorous physical activity from its participants. *Id.*, at 169, n. 1; see also 61 Pa. Stat. Ann. §§ 1123, 1126(d) (Purdon Supp. 1997). Yeskey, who has a history of hypertension, was found to be medically ineligible for the program by the Department of Corrections. See Pet. for Cert. 3.

Yeskey filed suit, claiming that by refusing to place him in the program, the Department of Corrections violated the Americans with Disabilities Act ("ADA"). He sought "damages and declaratory and injunctive relief, including an injunction requiring the defendant to release plaintiff from confinement on the date he would have been released if he had been allowed into the boot camp program." App. to Pet. for Cert. 15a.[2] The District Court dismissed the complaint, finding the

2. Apparently, neither the District Court nor the Court of Appeals noticed that it lacked subject matter jurisdiction to order early release. Habeas corpus is the exclusive remedy. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 500 (1973).

ADA inapplicable to state prisons. *Id.*, at 18a-19a. The Court of Appeals reversed. *Yeskey*, 118 F. 3d, at 170-172; Pet. for Cert. 3. The Commonwealth of Pennsylvania petitioned this Court for a writ of certiorari. Pet. for Cert. 13. The petition was granted on January 23, 1998.

SUMMARY OF ARGUMENT

The constitutional question of whether the ADA could validly apply to state prisons is properly before this Court. The question is whether the Act *does* apply, not merely whether it was *intended* to apply. In addition, a constitutionally doubtful construction should not be adopted if that can be avoided.

Application of the ADA to state prisons would not be a valid exercise of Congress's enforcement power under the Fourteenth Amendment. Such application would prohibit large amounts of constitutional state action, far out of proportion to any actual equal protection violations. Under *City of Boerne* v. *Flores* and *Oregon* v. *Mitchell*, such laws are not within the enforcement power.

Application of the ADA to state prisons is not within the commerce power. Prisons are not commercial activities. Applying the ADA to them would not enhance or protect any interstate market to any appreciable degree. The arguments that might be made for such application are precisely those rejected in *United States* v. *Lopez*.

Outside of enforcing the Civil War Amendments, Congress has no authority to regulate the states as states. Cases allowing laws of general applicability to apply to states are inapposite here, even assuming they have survived more recent cases. The section in question attempts to commandeer state resources to carry out Congressional policy directives. Application of this section to a core government function such as prisons would violate the doctrine of *New York* v. *United States* and *Printz* v. *United States*.

ARGUMENT

I. The constitutional issue may properly be considered in answering the question presented.

The question presented in the present case is "Does the Americans with Disabilities Act apply to inmates in state prisons?" Pet. for Cert. i. Respondent contends that "the question of the constitutionality of applying the ADA to state prisons is not properly before this Court" and urges a restriction of the question to statutory interpretation. Brief in Opposition 19.

There are two reasons why the question should not be so restricted. First, the constitutional issue is not cleanly severable from the interpretation issue. Second, a decision that Congress intended the ADA to apply, without deciding whether it constitutionally could, would fail to resolve the ultimate issue.

A. Statutory Interpretation and Constitutionality.

Many times over many years, this Court has stated a basic rule of interpretation of statutes. If the statute has two plausible interpretations, one clearly constitutional and the other doubtful, the clearly constitutional interpretation should be adopted. See, *e.g.*, *Edward J. DeBartolo* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U. S. 568, 575 (1988). To apply this rule, the constitutional issue must be considered before the statutory interpretation question is definitively answered. That is, the question of whether respondent's interpretation of the statute (*i.e.*, the ADA applies to state prisoners) would be constitutional must be investigated before that interpretation can be accepted as correct. If the Court were to ignore constitutional considerations while settling on this interpretation, it would then be faced in the next case with a constitutional question that might have been avoided by choosing petitioners' interpretation.

Respondent states that petitioners did not raise the constitutional issue in the Court of Appeals, and hence that it was not

decided there. Brief in Opposition 18. Petitioners' argument, though, is new authority for a consistent position and not a new position. That is, petitioners contend that the ADA does not apply to state prisons; and the argument that the contrary construction would be unconstitutional, and hence should be avoided, is a new argument, supported by new authority, for that consistent position. The interpretation of the statute is a question of law to be "resolved *de novo* on appeal." *Elder* v. *Holloway*, 510 U. S. 510, 516 (1994). A court resolving a question of law "should therefore use its 'full knowledge of its own [and other relevant] precedents.' " *Ibid.* (quoting *Davis* v. *Scherer*, 468 U. S. 183, 192, n. 9 (1984)).

The argument that respondent's interpretation of the statute would be unconstitutional can, and indeed must, be considered as an essential part of the interpretation process.

B. Constitutionality Per Se.

If the Court adopts respondent's interpretation of the statute despite its doubtful constitutionality, the question would then arise whether the Court should definitively resolve whether the statute, as so construed, was within the power of Congress to enact. In that event, there are two potential arguments against the Court addressing the question, both of which are weak, and one strong argument for resolving it.

One potential argument would be that the constitutionality of the ADA as applied to state prisons is not "fairly included" in the question presented. See Supreme Court Rule 14.1(a). Although *amicus* CJLF does not understand respondent's Brief in Opposition to make such an argument, a few words about why the issue is "fairly included" are in order.

The question of whether an Act of Congress applies to a particular situation necessarily includes both the interpretation question of whether it was *intended* to apply and the constitutional question of whether it *could* apply. See, *e.g.*, *Marbury* v. *Madison*, 1 Cranch 137, 173 (1803).

The fair inclusion of the question is much more clear in this case than it was in *Caspari* v. *Bohlen*, 510 U. S. 383 (1994). In that case, the stated question was " '[w]hether the Double Jeopardy Clause . . . should apply to successive non-capital sentence enhancement proceedings.' " *Id.*, at 389 (quoting certiorari petition). The question actually decided by *Bohlen* was that an affirmative answer would be a new rule which could not be created on habeas corpus. *Id.*, at 396-397. The latter question was not "subsidiary" on the face of the question presented; the "threshold" nature of the *Teague* inquiry was based on the law of habeas corpus, which was not mentioned in the question.

In the present case, by contrast, the constitutional issue is presented on the face of the question. The question is not whether Congress *intended* the ADA to apply to state prisons but whether it *does* apply. It does not apply if its application would be unconstitutional. Indeed, respondent's attempted modification of the question, see Brief in Opposition i, 19, effectively acknowledges this.

Respondent argues that the issue of constitutionality was not raised in or decided by the Court of Appeals. *Id.*, at 18. Unlike the consideration of constitutionality in the interpretation process, see *supra*, at 4-5, this point has some weight as applied to constitutionality *per se*. As a general rule, questions not considered below are not considered in this Court. *Taylor* v. *Freeland & Kronz*, 503 U. S. 638, 646 (1992).

General rules, though, have exceptions, as does this one. A "purely legal question" may be " 'appropriate for [this Court's] immediate resolution' notwithstanding that it was not addressed by the Court of Appeals." *Mitchell* v. *Forsyth*, 472 U. S. 511, 530 (1985) (quoting *Nixon* v. *Fitzgerald*, 457 U. S. 731, 743, n. 23 (1982)). The constitutional question here involves no findings of fact and is appropriate for immediate resolution.

Courts generally exist to resolve concrete disputes and not to opine on abstract questions. See *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991) (no advisory opinions). This Court, in

particular, exists to settle finally questions of national importance. See The Federalist No. 22, p. 150 (C. Rossiter ed. 1961) (A. Hamilton). If this Court were to decide that the ADA was *intended* to apply to state prisons, yet disclaim any opinion on whether it *validly may* apply, what would that settle? Arguably, it could settle Mr. Yeskey's individual claim on a theory of procedural default of the constitutional question. For that reason, *amicus* does not contend that there is an Article III imperative to resolve the constitutional question. But this Court does not grant certiorari to settle individual claims on case-specific points. See, *e.g.*, *Heck* v. *Humphrey*, 512 U. S. 477, 480, n. 2 (1994) (noting Court did not take the case to review a fact-bound issue).

The great question which prison administrators and state budget planners wait to have answered is whether they are bound by law to comply with the ADA. The possible complete answers are: (1) no, because the ADA, properly construed, does not apply to state prisons; (2) no, because the ADA, as so applied, is unconstitutional; or (3) yes, because the ADA is both applicable and constitutional. Any less complete answer will leave the prison administrators in legal limbo.

II. The ADA is not a valid exercise of Congress's Fourteenth Amendment enforcement power.

Section 5 of the Fourteenth Amendment confers upon Congress the power to enforce the Amendment by appropriate legislation. That section did not authorize the destruction of the federal system and its replacement by a unitary government, with the state as mere departments. See *City of Boerne* v. *Flores*, 521 U. S. ___, 138 L. Ed. 2d 624, 639-641, 117 S. Ct. 2157, 2164-2166 (1997). When the ink was barely dry on the Amendment's ratification, this Court declared, "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White*, 7 Wall. 700, 725 (1869), overruled on other grounds, *Morgan* v. *United*

States, 113 U. S. 479, 496 (1885). Section 5 of the Fourteenth Amendment did not change that.

Everyone can agree that the accommodation of disabled persons and their access to government programs is a desirable goal. The worthiness of the goal, however, does not justify the means. Indeed, the first statute ever declared unconstitutional by federal judges was a highly commendable act for the relief of disabled veterans of the American Revolution and the widows and orphans of those who had fallen. Understandably, the judges were somewhat embarrassed in announcing their decision that Congress had violated the separation of powers in its choice of means to implement this salutary law, but announce it they did. *Hayburn's Case*, 2 Dall. 409, 410, n. (1792).

So it is in this case. If Congress had really intended to give disabled prisoners full access to all prison "programs," as respondent contends, it could unquestionably have done so under the spending power by providing the necessary funds and conditioning receipt on compliance with certain standards. See *South Dakota* v. *Dole*, 483 U. S. 203, 212 (1987) (constitutionality of such statutes); *Board of Ed. of Hendrick Hudson Central School Dist.* v. *Rowley*, 458 U. S. 176, 179 (1982) (describing Education of the Handicapped Act). Instead, the ADA invokes the Fourteenth Amendment and the commerce power. 42 U. S. C. § 12101(b)(4). Neither of these powers supports the application of the ADA to state prisons.[3] *Amicus* will address the Fourteenth Amendment in this part and the commerce power in the next part.

The most straightforward, and least controversial, use of the Fourteenth Amendment enforcement power is to provide remedies to give practical effect to the substantive guarantees.

3. The lack of constitutional support, combined with the conspicuous absence of prisons and prisoners from the comprehensive lists in subdivision (a) of the same section, is further evidence Congress did not intend for the ADA to apply to state prisoners.

For example, the Fourteenth Amendment, by its own force, forbids racial discrimination in selecting juries, see *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880), but only Congress can make such discrimination a crime and punish it. See 18 U. S. C. § 243; *Ex parte Virginia*, 100 U. S. 339, 345-346 (1880); cf. *Liparota* v. *United States*, 471 U. S. 419, 424 (1985) (no federal common law crimes). The difficult question arises when Congress purports to prohibit a state government practice which does not violate the Fourteenth Amendment.

Katzenbach v. *Morgan*, 384 U. S. 641 (1966) was once thought to stand for the proposition that Congress could expand the protections of the Fourteenth Amendment beyond the substantive reach of the Amendment itself. That case involved a statute in which Congress had provided that persons educated in "American-flag schools" in languages other than English could vote, notwithstanding state English-literacy requirements. *Id.*, at 643.

The Court upheld the statute, thereby permitting Puerto Ricans to register to vote in New York, even if they could not read English. This result was reached without overruling a precedent that had upheld literary tests as a general matter. *Id.*, at 649. On its facts, this seems an unobjectionable result. The act involved the right to vote on a ground related to ethnicity. While literacy tests may be generally valid, the judgment of Congress that in this limited situation those laws operated in practice to disenfranchise an ethnic group in violation of the Fifteenth Amendment[4] was not necessarily inconsistent with that general rule.

The *Morgan* majority, however, used sweeping language "which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment." *City of Boerne*, *supra*,

4. Puerto Ricans are, of course, not a "race" as that term is used today. In the Reconstruction era, though, the word "race" was used to mean smaller groups. See *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 610-611 (1987).

138 L. Ed. 2d, at 643-644, 117 S. Ct., at 2168. Subsequent cases have not followed that interpretation of *Morgan*.[5]

Oregon v. *Mitchell*, 400 U. S. 112 (1970) sounded the retreat. The Court was badly splintered, and only Justice Black concurred in all four of the Court's separate holdings. The issue most pertinent to the present question was Congress's attempt to lower the voting age to 18 in state elections, as well as federal, thus invading the traditional power of the state to regulate its own elections.

Justice Black interpreted the Fourteenth Amendment as giving Congress authority to regulate in this area only to prevent racial discrimination. *Id.*, at 130. Justice Harlan expressly rejected the "notion of deference to congressional interpretation of the Constitution, which the Court promulgated in *Morgan* . . . ." *Id.*, at 209 (opinion concurring in part and dissenting in part). The provision's "validity therefore must rest on congressional power to lower the voting age as a means of preventing *invidious discrimination that is within the purview of [the Equal Protection] clause*." *Id.*, at 212 (emphasis added). Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, took a narrower view of *Morgan*. They understood that it had merely upheld Congress's determination that there had been actual discrimination against Puerto Ricans in New York, an Equal Protection violation by any standard, and that the extension of the vote was the remedy for this violation. *Id.*, at 295-296 (opinion concurring in part and dissenting in part).

Viewed through the retrospective lens of *Marks* v. *United States*, 430 U. S. 188, 193 (1977), the opinion concurring on the "narrowest grounds" is probably Justice Stewart's. Congress has the power "to provide the means of eradicating situations

---

5. "The broad language in *Morgan*, purporting to give Congress power to define equal protection, was unnecessary to the decision of the case. The Court's language appears to be an alternative holding rather than dictum, but subsequent decisions show that the Court has retreated from the more farreaching implications of *Morgan*." 3 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 19.3, p. 529 (2d ed. 1992).

that amount to a violation of the Equal Protection Clause . . . ." *Mitchell*, 400 U. S., at 296. It does not have the power "to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause . . . ." *Ibid.* To the extent *Morgan* may have been contrary, it did not survive *Mitchell*.

The other relevant holding of *Mitchell* involved Congress's temporary suspension of all literacy tests for voting nationwide. Given the sorry history of the racially discriminatory use of these tests to violate the very core of the Fifteenth Amendment, the Court had little trouble in agreeing unanimously that this was a proper exercise of Congress's enforcement power under that amendment. *Id.*, at 118, 132 (opinion of Black, J.). This included the *Morgan* dissenters. *Id.*, at 216 (opinion of Harlan, J.); *id.*, at 282-283 (Stewart, J., concurring in the judgment).

Taken together, these opinions indicate that before the enforcement power of Congress can apply there must first be a violation of the substantive requirements of the Fourteenth or Fifteenth Amendments. Where there are substantial violations, a remedy that sweeps in some nonviolations may be necessary. The problem of literacy tests provides a good example. Litigating each application of the tests to determine if it is discriminatory would be impractical, leaving the choice between tolerating large-scale violations of the Fifteenth Amendment or sweeping out some good-faith, nondiscriminatory uses of the tests along with the bad-faith uses.

The voting age question provides a clear counterexample. The 21-year-old voting age did not serve as an instrument for evading the Constitution. These clearly constitutional, if possibly unwise, statutes did not produce *de facto* constitutional violations on a large scale by burdening people deprived of their rights with case-by-case litigation. If these laws produced any constitutional violations at all, which is doubtful, the "remedy" included within its sweep vastly more constitutional applications than unconstitutional applications.

Twenty-seven years later, the question that fractured the Court in *Mitchell* produced not a single dissent in *City of Boerne* v. *Flores*, 521 U. S. ___, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997). The question was whether Congress had the authority to forbid actions of state and local government that were constitutional under the Free Exercise Clause as construed in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), but which would have violated the rule of *Sherbert* v. *Verner*, 374 U. S. 398 (1963), abandoned in *Smith*.[6] The only dissents were on the ground that *Smith* should be reconsidered. *City of Boerne*, 138 L. Ed. 2d, at 654, 117 S. Ct., at 2176 (O'Connor, J., dissenting); *id.*, at 667, 117 S. Ct., at 2186 (Souter, J., dissenting); *id.*, at 668, 117 S. Ct., at 2186 (Breyer, J., dissenting). Justice O'Connor largely agreed with the majority on the Congressional power question, *id.*, at 655, 117 S. Ct., at 2176, and Justice Breyer agreed in part. *Id.*, at 668, 117 S. Ct., at 2186. Justice Souter took no position on the point. *Id.*, at 667-668, 117 S. Ct., at 2185-2186.

City of Boerne confirmed, in a coherent majority opinion, the same conclusion that must be extracted from the splintered opinions in *Oregon* v. *Mitchell*. The power of Congress is remedial, not substantive. *Id.*, at 643, 117 S. Ct., at 2167. "While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved." *Id.*, at 645, 117 S. Ct., at 2169. Congress cannot throw out a whole nursery full of babies to dispose of a few ounces of bath water.

Assuming *Smith* to be correct, as we must unless and until this Court overrules it,[7] the act in question was "so out of proportion to a supposed remedial or preventive object that it

6. Congress's Fourteenth Amendment enforcement power is involved because the Free Exercise Clause is deemed to be incorporated in the Due Process Clause. See *City of Boerne*, 138 L. Ed. 2d, at 637, 117 S. Ct., at 2163.

7. See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the judgment).

cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*, at 646, 117 S. Ct., at 2170. "Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Ibid.*

These words could just as easily have been written about the Americans with Disabilities Act, if it is construed as broadly as respondent and the Court of Appeals construe it. Every agency at every level of government must reexamine every program and decide whether to make modifications and provide the necessary "auxiliary aids and services" to accommodate a wide variety of disabilities. See 42 U. S. C. § 12131. If they cannot afford to do so, then they must terminate the program. In the case of prisons, where programs to benefit prisoners are under heavy assault already,[8] termination may very often be the choice.

Cleburne v. *Cleburne Living Center*, 473 U. S. 432 (1985) established that mental retardation is not a "quasi-suspect classification" for the purpose of equal protection analysis. *Id.*, at 446. The test for differential treatment is therefore whether the distinction is "rationally related to a legitimate government purpose." *Ibid.* For the reasons stated in *Cleburne*, the same rule should apply to the disabled generally.[9]

First, unlike race, disability is often relevant. Cf. *id.*, at 442-443. The most common reason for a refusal to make an accommodation is simply an unwillingness to spend the extra money required. See, *e.g.*, *University of Texas* v. *Camenisch*,

8. For example, H. R. 667 § 401, passed by the House in the 104th Congress, would have removed all strength-training activities from federal prisons. It is not difficult to see how a lawsuit demanding accommodation in such a program, and the attendant expense, would be the last straw.

9. The author of a treatise on the subject, who generally takes an expansive view of rights of the disabled, concurs with this assessment. See L. Rothstein, Disabilities and the Law § 1.02, pp. 9-10 (1997).

451 U. S. 390, 392 (1981); *id.*, at 398-399 (Burger, C.J., concurring) (issue was not whether Camenisch could attend, but merely who would pay the additional expense). Expense would only be irrelevant in a program with unlimited resources. In the real world, expense is always relevant.

Second, the steady stream of legislation to benefit the disabled negates any notion that the disabled are the kind of politically powerless minority in special need of judicial protection from legislative animosity. Cf. *Cleburne*, 473 U. S., at 443-445.[10] Indeed, the disabled seem to have a unique capacity to get Congress to act swiftly in reaction to any adverse decision from this Court. *Smith* v. *Robinson*, 468 U. S. 992, 1021 (1984), which denied attorney's fees under the Education of the Handicapped Act (EHA), was abrogated only two years later. See 20 U. S. C. § 1415(e)(4)(B). *Dellmuth* v. *Muth*, 491 U. S. 223, 232 (1989) held, as a matter of statutory construction, that Congress had not intended to abrogate Eleventh Amendment immunity in the EHA. Congress abrogated the specific holding of *Dellmuth* the next year. Pub. L. No. 101-476, 104 Stat. 1103, 1106 (1990).[11] *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985) met the same fate on the same point regarding the Rehabilitation Act. Pub. L. No. 99-506, 100 Stat. 1807 (1986).[12]

Other groups can only look at this astonishing record of legislative triumph with envy. It took victims of crime *43 years* to correct the misinterpretation of the federal habeas corpus statute. Compare *Brown* v. *Allen*, 344 U. S. 443, 499 (1953) (Frankfurter, J., concurring) with 28 U. S. C. § 2254(d).

---

10. This point combines the *Cleburne* Court's second and third points.

11. Whether Congress actually had the authority to abrogate is another question. Although the state asserted Eleventh Amendment immunity in the District Court, App. to Pet. for Cert. 16a, it has not pressed that point here. The issue is presented in *Wilson* v. *Armstrong*, No. 97-686, certiorari pending.

12. There are many other statutes benefitting the disabled, of course. The history is described in Rothstein, *supra*, at 3-19.

Congress's declaration that the disabled are "relegated to a position of political powerlessness," 42 U. S. C. § 12101(a)(7), is far from self-validating. Indeed, it is close to self-negating. Any group with enough clout to convince Congress to declare it "powerless," in an obvious attempt to overturn one of this Court's precedents, is powerful indeed.

Cleburne's final point was that if the mentally retarded were accorded "quasi-suspect" status, a wide variety of other groups would be as well. 473 U. S., at 445-446. The *Cleburne* Court stated it was unwilling to do so. *Id.*, at 446. The obvious reason is that such a step would vastly increase judicial scrutiny of legislative decisions, with a corresponding abridgment of the people's right of self-government.

Applying the rational basis test, saving money is *always* a legitimate state interest. If more money is spent on a program, it must be either cut from another program, drained from the general economy through a tax increase, or borrowed so as to encumber the future.[13] Of course, a state cannot save money by arbitrarily cutting off a disfavored group which is not distinguishable on any basis relevant to that goal. See *Plyler* v. *Doe*, 457 U. S. 202, 229 (1982) (exclusion of "undocumented" children from school). Where the higher cost of including a particular person is the very essence of the classification, though, it cannot be seriously contended that the distinction is not rationally related to the legitimate purpose.

Obviously, the requirement to modify practices and provide "auxiliary aids and services," 42 U. S. C. § 12131(2); *id.*, § 12132, sweeps vastly further than the Equal Protection Clause. Under *City of Boerne*, this statute cannot be an exercise of Congress's enforcement power under the Fourteenth Amendment.

Unlike the Religious Freedom Restoration Act, though, this statute does not fall, at least not in its entirety, when the

---

13. The federal government has a fourth option: print paper money. The states do not. U. S. Const., Art. I, § 10, cl. 1.

Fourteenth Amendment support crumbles. As we will describe in the next section, most of the statute in most of its applications is a valid exercise of the commerce power.

III. Application of the ADA to state prisons would not be within the commerce power.

Since 1937, the power of Congress to regulate interstate commerce, U. S. Const., Art. I, § 8, cl. 3, has been understood to give Congress sweeping authority over commercial activity, even local businesses with only indirect effects on interstate commerce. This power includes a minimum wage law for employees of businesses which affect, but do not engage in, interstate commerce. *United States* v. *Darby*, 312 U. S. 100, 117 (1941). The power extends to a prohibition against racial discrimination by "Ollie's Barbecue," a local restaurant which purchases food that has moved in interstate commerce. *Katzenbach* v. *McClung*, 379 U. S. 294, 296-297, 305 (1964). Whatever the validity of this expansive interpretation as an original matter, it is now too deeply ingrained in the national fabric to overturn. See *United States* v. *Lopez*, 514 U. S. 549, 574 (1995) (Kennedy, J., concurring); *id.*, at 601 (Thomas, J., concurring) ("wholesale abandonment" not required).

With each expansion of the commerce power, the Court reiterated that there were limits, and that the limits would be enforced. See *id.*, at 557-558 (collecting cases). Yet until *Lopez* one could legitimately wonder whether the limits were rainbows that invariably vanished when approached.

Congress finally hit the wall in *Lopez*. That case involved a federal criminal statute prohibiting possession of a firearm in a school zone. *Id.*, at 551. "The Act neither regulates a commercial activity nor contains a requirement that the possession be in any way related to interstate commerce." *Ibid.* Congress had exceeded its commerce power. *Ibid.* The present case is very closely analogous.

After tracing the history of the Commerce Clause cases, *Lopez* concluded that there are "three broad categories of activity that Congress may regulate under its commerce power." *Id.*, at 558.

> "First, Congress may regulate the use of the channels of interstate commerce. See, *e.g.*, *Darby*, 312 U. S., at 114; *Heart of Atlanta Motel*, *supra*, at 256 (' "[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question" ' (quoting *Caminetti* v. *United States*, 242 U. S. 470, 491 (1917))). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. See, *e.g.*, *Shreveport Rate Cases*, 234 U. S. 342 (1914); *Southern R. Co.* v. *United States*, 222 U. S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez*, *supra*, at 150 ('[F]or example, the destruction of an aircraft (18 U. S. C. § 32), or . . . thefts from interstate shipments (18 U. S. C. § 659)'). Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U. S., at 37, *i.e.*, those activities that substantially affect interstate commerce, *Wirtz*, *supra*, at 196, n. 27." *Id.*, at 558-559.

For the final category, *Lopez* clarified that the effect on interstate commerce must be substantial. *Id.*, at 559.

In the present case, as in *Lopez*, the first two categories are easily dismissed. Prisons are not, by any stretch of the imagination, channels of interstate commerce. Nor is any instrumentality of commerce or person or thing in commerce endangered here. If application of the ADA to prisons could be sustained under the commerce power, it could only be under the "substantially affects" branch. Cf. *ibid.*

Among cases upholding the exercise of the commerce power, the most tenuous effect on interstate commerce can be found in *McClung*. The theory there was that discrimination reduced the amount of meat sold interstate and led to less interstate travel. 379 U. S., at 300. The thinness of this theory is offset by the fact that McClung was engaged in a purely commercial activity. He bought tangible goods in an interstate market and resold them. The least commercial activity, on the other hand, can be found in *Wickard* v. *Filburn*, 317 U. S. 111 (1942). While Filburn did not buy or sell wheat, his production of wheat for consumption on his own farm directly reduced the demand for wheat in the market. His activity, therefore, affected the commerce that was the central purpose of the statute, see *id.*, at 128, and not merely a peg on which to hang a law enacted for other reasons.

A state prison is typically not engaged in any commercial activity other than buying goods to be consumed there.[14] Application of the ADA might result in an increase in the level of expense in running a prison, but that would not be likely to have any appreciable effect on interstate commerce, especially if the state compensated for the increased cost of some programs by cutting others. Application of the ADA to prisons "is not an essential part of a larger regulation of economic activity . . . ." *Lopez*, 514 U. S., at 561.

The one finding in the statute that would support a connection between prisons, disabled persons, and commerce, is that "dependency and nonproductivity" impose costs on society. See 42 U. S. C. § 12101(a)(9). Conceivably, the inability of a prisoner to participate in a truly rehabilitative program could reduce his chances of being economically self-sufficient upon release, and thus a drag on the economy. This is indistinguishable from the "effect on classroom learning" rejected as insufficient in *Lopez*. 514 U. S., at 565; cf. *id.*, at 623 (Breyer,

14. A prison which made goods for sale in the market would be different. Congress can undoubtedly regulate the interstate shipment of prison-made goods. See 18 U. S. C. § 1761.

J., dissenting). Similarly, an argument that prisons might be on "the commercial side of the line" based on the magnitude of their consumption or because, ideally, they would equip prisoners with the skills to "go straight" is no different from the argument rejected as to schools. Compare *id.*, at 565 (majority) with *id.*, at 629-630 (dissent).

For prisons, as for schools, any rationale that would serve to uphold application of the ADA under the commerce power would serve to justify federal regulation of every detail of running the prisons. The federal judiciary has been backing away from "micromanagement" of state prisons in recent years. See *California Dept. of Corrections* v. *Morales*, 514 U. S. 499, 508 (1995). Congress has recently added a big push in the same direction. See generally, Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321-1366. Allowing litigation such as the present case would "run counter to the view expressed in several of [this Court's] cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin* v. *Conner*, 515 U. S. 472, 482 (1995). Indeed, precisely the claim at issue here, participation in a prison "boot camp" program, was cited in *Sandin* as the kind of litigation "squandering judicial resources with little offsetting benefit to anyone." *Id.*, at 482-483.

The management of state prisons is a core function of state government. Decisions as to what programs to establish in them, how much to spend on them, and who ought to participate in them are the kinds of decisions that go to the essence of governmental discretion. If the ADA applied to state prisons, it would "foreclose[] the States from experimenting and exercising their own judgment in an area to which states lay claim by right of history and expertise,[15] and it [would do] so by regulating an activity beyond the realm of commerce in the

15. Cf. *Preiser* v. *Rodriguez*, 411 U. S. 475, 492 (1973).

ordinary and usual sense of that term." *Lopez*, 514 U. S., at 583 (Kennedy, J., concurring).

The particular program at issue here illustrates the importance of state variety and experimentation. Boot camps as correctional programs are controversial, with many expressing doubts whether they work. See Mathlas & Mathews, The Boot Camp Program for Offenders: Does the Shoe Fit? 35 Int'l J. of Offender Therapy & Comp. Criminology 322, 323, 326 (1991); Mackenzie, et al., Boot Camp Prisons and Recidivism in Eight States, 33 Criminology 327, 328, 353-354 (1995). The only way to know for certain is to try different variations and see which, if any, lower the rate of recidivism. See Mackenzie, *supra*, 33 Criminology, at 353-354. If all programs nationwide must be modified to accommodate a wide variety of disabilities, and if they fail, we will never know if the unmodified programs would have worked.

Nearly all of the Americans with Disabilities Act *is* within the commerce power. The employment title applies to employers "engaged in an industry affecting commerce . . . ." 42 U. S. C. § 12111(5). The public accommodations title is limited to private entities affecting interstate or international commerce. 42 U. S. C. § 12181(1), (6), (7). The bulk of Title II, regarding public services, is addressed to transportation. 42 U. S. C. §§ 12141-12161. Even before 1937, a state-operated railroad was subject to regulation under the commerce power, *Houston, E. & W. Texas Ry. Co.* v. *United States*, 234 U. S. 342, 350 (1914), and similar services would fall under the same rule.

Prisons, though, are different. They are not commerce, and they are a core function of state government. Congress should not be deemed to have authorized, under the commerce power, pervasive regulation and litigation of a core function of state government with only the most tenuous connection to interstate commerce. If it did, it has exceeded its power, and the statute is unconstitutional as so applied.

IV. Other than the Civil War Amendments, Congress has no power to regulate the governmental operations of states.

"[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York* v. *United States*, 505 U. S. 144, 166 (1992); *Printz* v. *United States*, 521 U. S. ___, 138 L. Ed. 2d 914, 935, 117 S. Ct. 2365, 2377 (1997). If this Court meant what it said in *New York* and *Printz*, the ADA cannot apply to state prisons.

Cases involving regulation of states by the federal government fall into two groups. Most of the cases involve the application to the states of laws that apply equally to the private sector. *National League of Cities* v. *Usery*, 426 U. S. 833 (1976) and *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), which overruled *National League*, fall into this group. See *New York*, 505 U. S., at 160 (collecting cases). A smaller group, including *New York* and *Printz*, involves Congressional commands directed specifically to state and local government.

The present case falls on the *New York*/*Printz* side of this line. Title II, Subtitle A of the ADA, the only part at issue, is directed only to "public entities." See 42 U. S. C. § 12132. "Public entity" means only state and local governments, their departments, and certain passenger rail entities. 42 U. S. C. § 12131(1). Thus, while the statute at issue is part of a large package, much of which is directed to the private sector, the specific requirement is not a "generally applicable law[]" as *New York* uses that term. Cf. 505 U. S., at 160. Therefore, assuming *Garcia* survives *New York* and *Printz*, this case is governed by *New York* and *Printz* and not by *Garcia*.

Coyle v. *Smith*, 221 U. S. 559 (1911) appears to be the first case to squarely confront the question of direct regulation of a

state by Congress.[16] *Coyle* held that Congress could not direct the State of Oklahoma where to locate its capital. *Id.*, at 579-580.

What would be the result if the facts of *Coyle* were to come up today, in the post-1937 era of the vastly expanded commerce power? Certainly it would have a substantial effect on interstate commerce if Congress were to order the Commonwealth of Virginia to move its capital from Richmond to Arlington. Not only the government itself would move, but also the lobbyists, law firms, and other businesses that invariably accumulate around a government. Supplying the government and ancillary businesses would create a market for goods more accessible to merchants in Maryland and the District of Columbia, thus increasing interstate commerce to a considerably greater degree than the marginal increase in meat sales at Ollie's Barbecue. Cf. *Katzenbach* v. *McClung*, 379 U. S. 294, 300-301 (1964).

According to *Coyle*, the idea that Congress could issue this order "would not be for a moment entertained." 221 U. S., at 565. It would be no less absurd today. The conclusion inevitably follows that Congress's power to regulate under the Commerce Clause is less extensive than its power to regulate private businesses. The difference, as *New York* v. *United States* explains, is that the plan of the Constitution is for the federal and state governments to each regulate individuals, and not for the federal to regulate the state. See 505 U. S., at 164.

The original plan was, of course, greatly modified by the Fourteenth and Fifteenth Amendments. To insure that states obey the command of those amendments against racial discrimination, Congress has resorted to such intrusive measures as the requirement to "preclear" election changes with the Attorney General. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 327

16. *Lane County* v. *Oregon*, 7 Wall. 71, 77-78 (1869) avoided the constitutional question by construing the legal tender statute not to apply to state taxes, presaging the plain statement rule of *Gregory* v. *Ashcroft*, 501 U. S. 452, 460-461 (1991).

(1966). In part II, *supra*, we explained why the ADA cannot be sustained as an exercise of the Fourteenth Amendment enforcement power, and no other amendment is relevant. The amendments to the original constitutional plan, therefore, do not alter the conclusion.

In *New York* v. *United States*, the State of New York was forced to "a 'choice' of either accepting ownership of [nuclear] waste or regulating according to the instructions of Congress." 505 U. S., at 175. Each of these would be unconstitutional standing alone, so the forced choice was unconstitutional. *Id.*, at 176. The "take title" provision, standing alone, "would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers." *Id.*, at 175. This "would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." *Ibid.*

If a forced subsidy violates the anti-commandeering principle, then a requirement to provide "auxiliary aids and services" does as well. The reason goes to the heart of political accountability. Cf. *id.*, at 168-169. Government programs benefitting individuals are, by and large, popular. The taxes to pay for these programs, or the budget deficits when taxes are insufficient, are just as widely unpopular. To have any kind of political accountability and budget discipline, taxing and spending need to go together. Nothing would be more corrosive than for Congress to enact a popular but expensive program and impose the cost on the states.

Printz recognizes the same principle. "By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." 138 L. Ed. 2d, at 941, 117 S. Ct., at 2382. The state officials or legislators are the ones who must handle the downside. They must either raise state taxes or cut other programs, and they

must face the wrath of voters who will not always make the connection.

Setting priorities in spending lies at the heart of the discretion of governing. Even the most casual observer of the political scene knows that the budget bill is frequently the most hotly contested legislation of the year. Accommodating the disabled often costs money. See *University of Texas* v. *Camenisch*, 451 U. S. 390, 392 (1981). While this is a worthy goal, many other worthy goals also clamor for the state's money. In the American federal system, the places to resolve these competing demands are the state legislature and the elections for that legislature. Allocating the state budget is not a power of Congress. Cf. *Printz*, 138 L. Ed. 2d, at 970, 117 S. Ct., at 2404 (Souter, J., dissenting) (Congress cannot require administrative support without paying for it).

Application of the ADA to state prisons would be a direct regulation of the states by Congress, in an area outside the Fourteenth and Fifteenth Amendments. It would be a regulation of a core government function, not a commercial operation that happens to be run by a government. It would force the state to reallocate its own resources to meet federal policy priorities in preference to the priorities of the elected officials of the state. Such an application of this act is beyond the power of Congress.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be reversed.

March, 1998

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation